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KEY AMENDMENTS OF COMPANIES (SIGNIFICANT BENEFICIAL OWNERS) AMENDMENT RULES 2019

INTRODUCTION

With a view to facilitate smoother and practical implementation of the provisions, the Ministry of Corporate Affairs has drastically revised and amended Significant Beneficial Ownership Rules 2018 ("**SBO Amendment Rules**") on 8th February, 2019. The key intention behind formation of these rules is to disclose those shareholders who ultimately control the corporate entities in India and derive economic benefits.

KEY AMENDMENTS AND COMPARISON

Background

The Companies (Significant Beneficial Owner) Rules 2018 ("**the Old SBO Rules**") notified on 13th June 2018, was formed with the objective of identification of the ultimate beneficial owner of shares in multiple corporate structures.

a) Amendment in the Definition of "Significant Beneficial Owner".

The Old SBO Rules defined "significant beneficial owner" under Rule 2 as "an individual holding ultimate beneficial interest of not less than 10%, but whose name is not entered in the register of members of a company". Explanation I clarifies that "where the member is a company, the significant beneficial owner is the natural person who whether alone or acting together with other natural persons, or through one or more other persons or trusts holds not less than 10% of the capital of the company or who exercises significant influence or control over the company through other means."

The SBO Amendment Rules through its amendment has further clarified to bring in lucidity with respect to the scope of the definition and the disclosure regime.

The amended definition for the Significant Beneficial Owner ("**SBO**") is-
Every individual, who acting alone or together, or through one or more persons or trust, possesses one or more of the following rights or entitlements in a reporting company-,

i. *holds indirectly, or together with any direct holdings, not less than 10% of the shares;*
ii. *holds indirectly, or together with any direct holdings, not less than 10% of the voting rights in the shares;*
iii. *has the right to receive or participate in not less than 10% of the total distributable dividend or any other distribution; or*
iv. *has the right to exercise, or actually exercises, significant influence or control other than through direct Holdings.*

The Explanations to Rule 2 of the SBO Amendment Rules then goes on to explain how significant beneficial ownership will be determined in various cases.

Significance of Indirect Holding/Entitlement

Explanation I clarifies that if an individual does not possess any of the rights or entitlement indirectly as per the clauses mentioned above then he shall not be considered as significant beneficial owner. Therefore, as per this clarification, in order to be an SBO, a person must have an indirect right or entitlement and where the person has only direct holding, he shall not be termed as the SBO as per the SBO Amendment Rules.

Explanation II further clarifies the rights and entitlement of an individual and specifies criteria for the same-
It states that *an individual shall be considered to hold a right or entitlement directly in the reporting company, if he satisfies any of the following criteria, namely*

i. *the shares in the reporting company representing such right or entitlement are held in the name of the individual;*
ii. *the individual holds or acquires a beneficial interest in the share of the reporting company under subsection (2) of section 89*[1]*, and has*

[1] Every person who holds or acquires a beneficial interest in share of a company shall make a declaration to the company specifying the nature of his interest, particulars of the person in whose name the

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made a declaration in this regard to the reporting company.

Further, Explanation III clarifies and adds that amended definition also covers individuals holding a right or entitlement indirectly through Hindu undivided family, body corporate, partnership entities and trusts, which are members in the reporting company.

b) Insertion of New Rule 2A

The new Rule 2A has been inserted by way of the SBO Amendment Rules 2019 to impose responsibility on the reporting company to take all the necessary steps to find out if there is any individual who is the Significant Beneficial Owner as defined in Section 2 (h) of the SBO Amendment Rules

Moreover, the reporting company shall also serve notice to all the members of the company (excluding individuals) who hold more than 10% of its shares, or voting rights or right to receive or participate in the dividend or any other distribution payable in a financial year seeking information in accordance with sub - section 5 of Section 90 of the Companies Act, 2013.

c) Substitution of Rule 3 (Responsibility of Significant Beneficial Owner)

The substitution of Rule 3 has imposed a number of obligations with respect to Disclosures that the Significant Beneficial Owner has to fulfil at various stages.

- Initial Disclosure- Every individual who has qualified as an SBO in the reporting company shall file the declaration Form No. BEN-1 within 90 days from February 8, 2019.

- Continual Disclosure- Every individual, who subsequently becomes an SBO or where his significant beneficial ownership undergoes any change, is required to file a declaration in Form No. BEN-1 within 30 days of acquiring such significant beneficial ownership to the reporting Company.

- Clarification with respect to becoming the SBO or any change therein during the transition time- In the event where the significant beneficial ownership of an individual undergoes any change, or the individual becomes the significant beneficial owner within 90 days of the commencement of the SBO Amendment Rules, then he shall deem to be the SBO.

d) Substitution of Rule 7

The amended Rule 7 states that in case the SBO fails to give satisfactory information to the reporting company under sub-section 7 of Section 90 of the Companies Act 2013, it shall be an obligation on the reporting company to apply to the National Company Law Tribunal ("**Tribunal**") for directing the shares in question. However, this is subject to the following -
a) Restriction on transfer of interest attached to the shares which are in question.
b) Suspension of right to receive dividend or any other distribution in relation to the share in question.
c**)** Suspension of voting rights in relation to the shares in question;
d) Any other restriction on all or any of the rights attached with the shares in question.

However, the Old SBO Rule 7 does not make an obligation on the company to apply to the Tribunal as the word used in the Old SBO Rule is "may". Thereby, we can interpret that earlier it was on the discretion of the company to decide whether it wants to apply to the Tribunal or not. However, the new rule uses the term "shall" which impose an obligation on the reporting company to apply to the Tribunal if satisfactory information is not given by the SBO. Moreover, the Old SBO Rule did not go to the extent of determining whether the information given by the SBO is satisfactory or not. However, the new Rule 7 gives the right to the reporting company to determine whether the information is satisfactory in accordance with sub-section (7) of Section 90 of the Companies Act 2013 and if it is not then the application can be made to the Tribunal.

shares stand registered in the books of the company and such other particulars as may be prescribed.

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CONCLUSION

With these revised rules and forms in effect, it seems that the practical implementation of the provisions will be simpler and easier as compared to the Old SBO Rules. However, it depends on the Companies to make these provisions implemented in a proper manner and ensure that the compliance of these provisions is made. Needless to mention that the burden on the Companies will increase drastically as the real test will be on them to ensure that the compliance is made or not.

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BANNING OF UNREGULATED DEPOSITS ORDINANCE, 2019

INTRODUCTION

The advent of the Unregulated Deposit Scheme Ordinance, 2019 can be said to be a by-product of the Saradha Scam. Post the Saradha Scam, the Standing Committee on Finance in its 21st report dated 21.09.2015 came up with a comprehensive regulatory framework to regulate the acceptance of deposits from the public. There has not been any specific regulator to keep a check on these transactions as certain entities fell under the jurisdiction of various regulatory bodies and they were overlapping at times. In lieu of the suggestions given by the Committee as referred above, an Inter-Ministerial Group was formed to identify the loopholes in the existing framework. Suggestions given by the Inter-Ministerial Group included but were not limited to enactment of a comprehensive centralised act governing the regulation, acceptance, criminalising and promotion of 'unregulated deposit schemes'.

Keeping this in light, the Hon'ble President of India, on the aid and advice of the Union Government, on February 21, 2019 promulgated 'The Banning of Unregulated Deposit Schemes Ordinance, 2019' (hereinafter referred to as "**Ordinance**").

Meaning of 'Deposit' in case of Companies:- In the case of companies, 'Deposit' would mean the definition attached to it under the Companies Act, 2013.

Meaning of 'Deposit' in case of Non-Banking Financial Companies:- In the case of NBFCs, the term 'Deposit' would mean the expression being defined in Section 45-I (bb) of the Reserve Bank of India Act, 1934.

Meaning of 'Deposit' in case of persons other than Companies and NBFCs:- In such cases, a 'Deposit' means any money received as loan or advance by a deposit taker with a promise to return the same, either in cash or in kind or in the form of a specified service, with or without any benefit in the form of interest, bonus, profit or in any other form.

Definition of Unregulated Deposit Scheme

Section 2(17) of the Ordinance defines Unregulated Deposit Scheme ("**UDS**") as a '*scheme or an arrangement under which deposits are accepted or solicited by any deposit taken by way of business and such deposits are not a Regulated Deposit Scheme'.* Therefore, this Ordinance covers only UDS.

Secondly, Regulated Deposit Schemes are listed in Schedule I of the Ordinance and includes but is not limited to schemes regulated by the SEBI, RBI, MCA, Employees Provident Fund Organisation, schemes regulated by the state government or the central government, chit fund businesses, amounts received by co-operative societies and deposits accepted under Chapter V of the Companies Act, 2013.

Apart from defining the term 'Deposit' in clear terms and banning unregulated deposit, the Ordinance also stipulates the provisions with respect to wrongful inducement in relation to UDS. Referring to Section 5 of the Ordinance which says-

"*No person by whatever name called shall knowingly make any statement, promise or forecast which is false, deceptive or misleading in material facts or deliberately conceal any material facts, to induce another person to invest in, or become a member or participant of any Unregulated Deposit Scheme."*

Furthermore, the Ordinance has also brought under its ambit the appointment of a competent authority so as to regulate the banning of UDS. This authority has been given the power and right to appoint officers and has been given powers as stipulated under the Civil Procedure Code, 1908. Moreover, any proceeding initiated on the part of the competent authority shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code.

Role of the government

A major role is to be played by the government here. The jurisdiction for trying an offence under this ordinance lies

with a designated court. Therefore, under Section 8 of the Ordinance, the appropriate government shall be responsible for constituting one or more courts as the designated courts by a notification upon concurrence with the Chief Justice of the concerned High Court. The designated court shall be presided by a Judge not below the rank of a District and Sessions Judge or Additional District and Sessions Judge.

Chapter IV of the said Ordinance stipulates the establishment and operation of a central database. The Central Government may designate an authority, whether existing or constituted which shall be responsible to create, maintain and operate an online database for information on deposit takers operating in India.

Therefore, post the commencement of this Ordinance, if any deposit taker carries on its business, it shall have to intimate the authority about its business. This indicates the vigilance mechanism of the Ordinance since maintaining an online database will not allow unscrupulous transactions w.r.t. Deposit Schemes.

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KEY TAKEAWAYS OF THE DRAFT E-COMMERCE POLICY DATED 23 FEBRUARY, 2019

INTRODUCTION

The Government released the draft national e-commerce policy (Hereinafter referred as "**Draft Policy**"), proposing to set up a legal as well as technological framework for restrictions on cross-border data flow, and also laid down conditions for businesses regarding collection or processing of sensitive data locally and storing it abroad.

KEY TAKEAWAYS

The framework of the Draft Policy is created in such a manner that it provides the foundation on which the restrictions are imposed on cross border data flow from specified sources, including data collected by Internet of Things devices installed in public space, and data generated by users in India by various sources, including e-commerce platforms, social media and search engines.

The Draft Policy has mainly addressed upon six broad issues of the e-commerce ecosystem. These issues are as follows-

- data,
- infrastructure development,
- e-commerce marketplaces,
- regulatory issues,
- stimulating domestic digital economy and
- Export promotion through e-commerce.

India's Data for India's Development

This is one of the important issues that are highlighted in the Draft Policy. It is a well known fact that today data flows freely across borders. It can be stored, processed anywhere in the world and the processor can take the advantage of this data and appropriate all the value. However, the Draft Policy highlights this issue and emphasizes that data generated in India shall be used for India's development. The citizens of India shall utilize and take the economic benefit from the monetisation of data.

In lieu of the same, the Draft Policy has laid down certain restrictions and conditions which need to be adhered upon, so that maximum benefit can be given to the citizens of India and move towards the development of India.

Restriction on Business Entities

Per the Draft Policy, a business entity which collects or processes any sensitive data in India and stores it abroad shall be required to follow the certain conditions.

These conditions are as follows-

- The data stored abroad shall not be made available to any other business entities outside India, for any purpose, even with the customer consent.
- The data shall also not be made available to any third party for any purpose.
- The data shall not be shared with any foreign government without prior permission of the Indian authorities.

The Draft Policy further suggests that in future, a suitable framework shall be developed so that the data can be shared in a larger community which will serve larger public interest. For the implementation of the Draft Policy, a "data authority" will be established which will be responsible to execute and implement the regulations.

E- Commerce Market Place Businesses

The Draft Policy aimed to encourage foreign direct investment only via market place model. The policy is made taking into consideration the spirit of the regulations. It aims that the misuse of data shall be stopped and controlled and thereby the framework is made in such a manner that will cover all the major issues and maintain the spirit of the regulations at the same time. The Draft Policy states that online market place business models shall be framed and it shall not

encourage or favour only handful traders on the platform and shall not at all be discriminatory or price-manipulative in any manner. The Draft Policy has prescribed a procedure which needs to be followed by all e-commerce websites and applications. It is mandatory for all e- commerce website and applications to have a registered business entity in India as the importer on record or as the entity through which transaction of all sales can be done.

This protocol will be able to ensure compliance of rules and regulations and help in reducing fraudulent practices and also help in growth of digital economy.
The Draft Policy also suggested that existing laws and regulations need to evolve and change in accordance with the changing business models. Moreover, with regards to taxation related issues, the Draft Policy suggests that current practice of non imposition of custom duties on economic transmissions shall be revised taking into consideration a rapid change in the digital economy.

Critical view- More a miss than a hit?

The Draft Policy is innovative in its approach but there are certain areas wherein the policy is silent and which may create certain problems in future unless further clarifications are provided, like:

- The Draft Policy failed to provide a substantial platform for the business and did not talk about domestic players in the sector who are the primary beneficiaries of the policy change.
- The policy emphasizes that all data generated in India should belong to Indians and the Government holds this data in trust for the citizens of the country. This approach is directly at odds to the right to hold personal data and the judgment of right to privacy of the Supreme Court. This is can be considered as a loophole which needs to be addressed.
- The Draft Policy states that data generated in India and stored in abroad shall not be shared with anyone outside India even with the consent of the data principal. The implication of such a law will have widespread implication specifically on the ways of tech giants. Moreover, the government will have access to all the data which will directly affect the privacy of Indian citizens.
- The Draft Policy does mention how a handful of companies dominate the digital economy capitalising on the data they have gathered and thereby making it hard for others to enter the market. However, it fails to talk about how that advantage is being amplified by the use of new technologies such as artificial intelligence and machine learning today.

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Amendment in Companies (Adjudication of Penalties) Rules, 2019

The Ministry of Corporate Affairs vide its notification dated 19th February 2019, has notified the Companies (Adjudication of Penalties) Amendment Rules, 2019. Rule 3 of Companies (Adjudication of Penalties) Rules, 2014, has been substituted with a new rule wherein the Central Government may appoint any of its officers as adjudicating officers for adjudging penalty. The time period for the adjudication process has been reduced from 45 days to 30 days. Moreover, the reply to the notice issued by the adjudicating authority shall be filed in electronic mode only and within the period as prescribed in the said notice. The adjudicating authority shall decide whether the physical appearance is required or not and then pass the order accordingly which shall be uploaded on the website. Penalty shall be paid through MCA Portal only.

[Source- http://www.mca.gov.in/Ministry/pdf/AdjudicatioPenalties2019_20022019.pdf]

Establishment of New Delhi International Arbitration Centre

On 2 March 2019, The New Delhi International Arbitration Centre Ordinance 2019 ("**Ordinance**") was promulgated by the President of India. It has been proposed to establish an International Arbitration Centre at New Delhi, replacing the International Centre for Alternative Dispute Resolution set-up in the year 1995. The Ordinance is based on the report prepared by ten-member committee chaired by Justice B.N. Srikrishna in order to review the institutionalization of arbitration in India. Pursuant to findings of the report, the Central Government prepared a Bill and the same was introduced in the Lok Sabha as the "The New Delhi International Arbitration Centre Bill 2018." The proposed Arbitration Centre shall be a statutory body consisting of a chairperson, two eminent persons having substantial knowledge in international and domestic arbitration, one representative of a recognized body of commerce, Secretary to the Ministry of Law & Justice, Finance Advisor and a Chief Executive Officer. The objective/aim behind the establishment of New Delhi International Arbitration Centre is to create an independent and autonomous regime for better and efficient management of Arbitration.

[For Details, Refer to http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/2_2018_LS_Eng.pdf,]

IBBI issues a Charter of Responsibilities of IRP / RP and CoC.

The IBBI recently issued a Charter of Roles and Responsibilities ("**Charter**") with an aim to bring more clarity and defined particular roles of IRP and CoC who are involved in the insolvency resolution process This Charter will specifically give a complete and clear understanding to the stakeholders of their roles and responsibilities. This Charter is not required to be mandatorily followed and has been issued only to educate the stakeholders of the companies. In order to make the process smooth, this Charter is a beneficial step and shall overcome any duplication in the roles and responsibilities between IRP and CoC. Recently, the Supreme Court has also clarified that IRPs are not required to give any opinion on a resolution plan and also observed that the commercial wisdom of CoC shall be given the paramount status without any judicial intervention so that the process can be completed within the timeframe prescribed by the IBC.

[For Details, Refer to https://ibbi.gov.in/webadmin/pdf/whatsnew/2019/Mar/Charter%20IP-CoC_2019-03-.01%2021:55:28.pdf]

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When can the complaint of Cheque bounce be quashed against the Director of the Company? [A.R Radha Krishna v/s Dasari Deepthi and others]

The Supreme Court's recent decision regarding Sections 138 and 141 of Negotiable Instrument Act, 1881 adjudicated an important question of when a complaint of cheque bounce can be quashed against the director of a company., The Supreme Court categorically stated in its judgment that it requires specific averment that (a) the director was in charge of and is responsible for the conduct of the company's business at the time of commission of the offence or (b) some unimpeachable evidence has been brought on record which leads to the conclusion that director is not responsible for the conduct of the business of company at the relevant time. The entire onus has been shifted to the director to prove that he is not at all involved in conduct of the business at that particular time when the offence was committed.

[Read full Judgment at https://www.sci.gov.in/supremecourt/2017/38314/38314_2017_Order_28-Feb-2019.pdf]

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